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IN THE

Supreme Court of the United States

October Term, 1940

No. 26

WEST INDIA OIL COMPANY (PUERTO RICO),
Petitioner,

vs.

MANUEL V. DOMENECH, Treasurer of Puerto Rico (Substituted for Rafael Sancho Bonet, former Treasurer),*
Respondent.

BRIEF FOR PETITIONER.

JAMES R. BEVERLEY,
Attorney for Petitioner.

* Motion for Substitution made September 10, 1940.

INDEX

PAGE

Table of Cases.

PAGE

Table of Statutes.

Other Authorities.

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BRIEF FOR PETITIONER.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This case involves the validity of the application of the Puerto Rican 2% *ad valorem* sales tax to foreign fuel oil stored temporarily in federally bonded tanks in Puerto Rico and delivered directly out of such bonded tanks to ships' bunkers under the supervision of the United States Customs Service, for use at sea in the propulsion of ships in foreign journeys and in journeys between the Island of Puerto Rico and the continental United States, the contracts

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for such sales to ships having been entered into in New York City.

The District Court of San Juan held that such tax could not be applied to foreign fuel oil pumped from federally bonded tanks into ships' bunkers; that such oil having never been entered through the United States Customs, never became a part of the mass of property within the taxing jurisdiction of Puerto Rico, and that the "sales" taxable under the Puerto Rico Sales Tax Act are only those sales carried out in the Puerto Rican market.

The Supreme Court of Puerto Rico reversed the District Court, holding that the delivery of the oil in Puerto Rico to ships constituted a sale in Puerto Rico taxable by the Insular Government, and inferentially (R. 46, 48) that at the moment of pumping of the oil to ships' bunkers, the foreign oil lost its character as an import and "came into" Puerto Rico and became subject to the taxing jurisdiction of the Island.

The United States Circuit Court of Appeals for the First Circuit at Boston affirmed the Supreme Court of Puerto Rico (R. 65 ff.).

This Court granted certiorari (R. 61).

Questions Presented.

The questions presented for consideration are all related to the status of foreign fuel oil not entered through the United States Customs but stored in Puerto Rico in federally bonded tanks and subsequently, under the supervision of United States Customs officers, pumped from the bonded tanks to ships' bunkers for use and consumption on the high seas. Although the questions are interrelated, it seems advisable to present them under three headings.

1. Whether the sale in New York and delivery within the geographical limits of Puerto Rico to ships' bunkers of foreign fuel oil brought by petitioner to Puerto Rico and stored in Federally bonded tanks under the joint custody of petitioner and the United States Customs officers to await delivery to ships' bunkers, is subject to the tax on sales imposed by Section 62 of Act No. 85 of the Legislature of Puerto Rico approved August 20th, 1925 as amended by Act No. 17 approved June 3rd, 1927.

The Circuit Court of Appeals erroneously assumed in its opinion that the tax involved was "an excise tax based on the privilege of conducting such business". This is incorrect. Business license taxes are provided for in another section of the same taxing act (Section 84 of Act No. 85) which is not in controversy here. The tax here concerned is a straight tax on sales.

2. Whether foreign fuel oil stored in federally bonded tanks in Puerto Rico and later transferred to ships' bunkers for consumption on the high seas is "exported" within the meaning of the Tariff Act of 1930 (19 U. S. C. A. 1309) and the Revenue Act of 1932 (48 Stat. 256; 26 U. S. C. A., pp. 427-435), and if so, whether such definitions would control in all transactions covering the foreign fuel oil here involved, considering that such fuel oil has never been entered through the United States Customs and remains, while in Puerto Rico, under Customs custody.

3. Whether a Puerto Rico tax on the sale of foreign fuel oil which has never been entered through the Customs, and delivery of which is made in Puerto Rico out of federally bonded tanks to ships' bunkers for consumption on the high seas, would constitute a prohibited burden on foreign commerce and on commerce between Puerto Rico and the continental United States.

Statutes Involved.

The statutes to be considered in connection with this case are certain parts of the Act of Congress of March 2nd, 1917, known as The Organic Act of Puerto Rico (39 Stat. 951) quoted hereafter; Section 62 of Act No. 85 of the Legislature of Puerto Rico approved August 20th, 1925, as amended by Act No. 17 approved June 3rd, 1927; Section 555 of the Tariff Act of 1930 (46 Stat. 743), under which the oil tanks here involved were bonded. Also involved are the title and Section 309 of the Tariff Act of 1930 and Sections 601 and 630 of the United States Revenue Act of 1932.

The first paragraph of Section 2 of the Organic Act of Puerto Rico (48 U. S. C. A. 737) reads as follows:

> "No law shall be enacted in Puerto Rico which shall deprive any person of life, liberty or property without due process of law, or deny to any person therein the equal protection of the laws."

Section 3 of the Organic Act of Puerto Rico (48 U. S. C. A. 741) provides in part as follows:

> "No export duty shall be levied or collected on exports from Puerto Rico . . ."

Section 2 of the Act of Congress of April 12th, 1900 (31 Stat. 77; 48 U. S. C. A. 739) which is still in effect, provides in part as follows:

> "The same tariff, customs, and duty shall be levied, collected, and paid upon all articles imported into Puerto Rico from ports other than those of the United States which are required by law to be collected upon articles imported into the United States from foreign countries.".

Section 62 of the Internal Revenue Law of Puerto Rico, Act No. 85 approved August 20th, 1925, as amended by Act

No. 17 approved June 3rd, 1927 (Laws of 1927, Special Session, pp. 458-486) provides as follows:

> "Section 62.—There shall be levied and collected once only on the sale of any article the object of commerce, not taxed under Section 16 of this Act or exempted from taxation as provided in Section 83 of the same, and at the time of sale in Puerto Rico, a tax of two (2) per cent on the price or value of the daily sales of such article, whether such sales are for cash or on credit, which tax shall be paid at the end of each month by the person making such sale."

The title of the United States Tariff Act of 1930 reads:

> "An Act to Provide Revenue, *to Regulate Commerce with Foreign Countries, to Encourage the Industries of the United States,* to Protect American Labor and for Other Purposes" (19 U. S. C. A. 1001; italics supplied).

The pertinent sections of the U. S. Tariff Act of 1930 and the United States Revenue Act of 1932 are as follows:

Tariff Act of 1930.

Tariff Act of 1930, Act of June 17, 1930, c. 497, 46 Stat. 690, 743, Secs. 309, 555, 556, Titles III and IV; 19 U. S. Code, Pars. 1309, 1555 and 1556:

> "Sec. 309. Supplies for certain vessels—Exemption from customs duties and internal-revenue tax.
>
> "(a) Article of *foreign* or domestic manufacture or production may, under such regulations as the Secretary of the Treasury may prescribe, be *withdrawn from bonded warehouses* or bonded manufacturing warehouses *free of duty or internal-revenue tax* for supplies (not including equipment) of vessels of war, in ports of the United States, of any nation

which may reciprocate such privilege toward the vessels of war of the United States in its ports, or *for supplies* (not including equipment) of vessels of the United States employed in the fisheries or in the whaling business, or actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or *between the United States and any of its possessions*, but no such article shall be landed at any port or place in the United States or in any of its possessions. (Italics supplied.)

Drawback.

"(b) Articles of domestic manufacture or production laden as supplies upon any such vessel shall be considered to be exported within the meaning of the drawback provisions of this chapter. (June 17, 1930, c. 497, Title III, Sec. 309, 46 Stat. 690.)

"Sec. 555. Bonded Warehouses.

"Buildings, or parts of buildings and other enclosures may be designated by the Secretary of the Treasury as bonded warehouses for the storage of imported merchandise entered for warehousing, or taken possession of by the collector, or under seizure, or for the manufacture of merchandise in bond, or for repacking, sorting, or cleaning of imported merchandise. Such warehouses may be bonded for the storing of such merchandise only as shall belong or be consigned to the owners or proprietors thereof and be known as private bonded warehouses, or for the storage of imported merchandise generally and be known as public bonded warehouses. Before any imported merchandise not finally released from customs custody shall be stored in any such premises, the owner or lessee thereof shall give a bond in such sum and with such sureties as may be approved by the Secretary of the Treasury to secure the Government against any loss or expense connected with or arising from the deposit, storage, or manipulation of mer-

chandise in such warehouse. Except as otherwise provided in this Act, bonded warehouses shall be used solely for the storage of imported merchandise and *shall be placed in charge of a proper officer of the customs,* who, together with the proprietor thereof, shall have joint custody of all merchandise stored in the warehouse; and all labor on the merchandise so stored shall be performed by the owner or proprietor of the warehouse, under supervision of the officer of the customs in charge of the same, at the expense of the owner or proprietor. The compensation of such officer of the customs and other customs employees appointed to supervise the receipt of merchandise into any such warehouse and deliveries therefrom shall be reimbursed to the Government by the proprietor of such warehouse. (Italics supplied.)

"Sec. 556. Same—Regulations for Establishing. —The Secretary of the Treasury shall from time to time establish such rules and regulations as may be necessary for the establishment of bonded warehouses and to protect the interests of the Government in the conduct, management, and operation of such warehouses and in the withdrawal of and accounting of merchandise deposited therein."

Revenue Act of 1932.

Revenue Act of 1932; June 6, 1932; c. 209 Sections 601(a); 601(c) 4; 601(b) 5; 630 (as amended June 16, 1933, c. 96, Sec. 5, 48 Stat. 255); U. S. Internal Revenue Code, Sections 3420, 3422, 3430, 3451; 47 Stat. 259, 260:

Part I. Special Provisions

"Sec. 3420. Imposition of tax.—In addition to any other tax or duty imposed by law, there shall be imposed upon the following articles imported into the United States unless treaty provisions of the United

States otherwise provide a tax at the rates specified in sections 3422 to 3425, inclusive. 53 Stat. 414.

"Sec. 3422. Petroleum and derivatives.—Crude petroleum, ½ cent per gallon; fuel oil derived from petroleum, gas oil derived from petroleum, and all liquid derivatives of crude petroleum, except lubricating oil and gasoline or other motor fuel, ½ cent per gallon; . . . The tax on the articles described in this section shall apply only with respect to the importation of such articles. 53 Stat. 414.

"Sec. 3430. Applicability of tariff provisions.—The tax imposed by section 3420 shall be levied, assessed, collected, and paid in the same manner as a duty imposed by the Tariff Act of 1930, 46 Stat. 590, 672 (U. S. C. Title 19, c. 4) and shall be treated for the purposes of all provisions of law relating to the customs revenue as a duty imposed by such Act, except that . . . and for the purposes of taxes under sections 3422 to 3425, inclusive, the term 'United States' includes Puerto Rico. 53 Stat. 415.

"Sec. 3451. Exemption from tax of certain supplies for vessels.—Under regulations prescribed by the Commissioner, with the approval of the Secretary, no tax under this chapter shall be imposed upon any article sold for use as fuel supplies, ships' stores, sea stores, or legitimate equipment on vessels of war of the United States or of any foreign nation, vessels employed in the fisheries or in the whaling business, or actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States *or between the United States and any of its possessions.* Articles manufactured or produced with the use of articles upon the importation of which tax has been paid under this chapter, if laden for use as supplies on such vessels, shall be held to be exported for the purposes of section 3430. . . ." 53 Stat. 419. (Italics supplied.)

Opinions Below.

The opinion of the District Court of San Juan is not reported. It is found in the Record at pages 15-22. The opinion of the Supreme Court of Puerto Rico is officially reported in Spanish in 56 D. P. R. 732 (Advance Sheets). A translation into English of the same is found in the Record at pages 33-49. The opinion of the United States Circuit Court of Appeals for the First Circuit is reported in 108 Fed. (2d) 144.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code of the United States, as amended by the Act of February 13th, 1925, c. 229, 43 Stat. 938. The Judgment of the United States Circuit Court of Appeals for the First Circuit was entered December 15th, 1939. Certiorari was applied for March 2nd, 1940 and was granted by this Court April 22nd, 1940.

Statement of Facts.

West India Oil Co. (P. R.), petitioner here, is a corporation organized under the laws of Puerto Rico and engaged in Puerto Rico in the importation, sale in Puerto Rico, exportation to foreign ports and in the delivery to ships for their own use upon the high seas of petroleum products. So far as the present case is concerned, petitioner brings fuel oil from Aruba, Dutch West Indies, to Puerto Rico and stores it in bond under Section 555 of the Tariff Act of 1930 (46 Stat. 743, 19 U. S. Code 1555) copied above. The fuel oil is not entered through the Customs but is either reexported or is delivered out of the bonded tanks to ships' bunkers for their use on the high seas in journeys either to

foreign ports or to ports of the continental United States (R. 24, Qs. 12, 16; also R. 25, Q18). In accordance with the Tariff Act of 1930 and in accordance with the regulations of the United States Customs Service, the oil so deposited in bonded tanks is under the joint control of the Customs Service of the United States and of the owner (R. 25, Qs. 18(f), 18(i); also R. 31, Q90). Since the fuel oil is not entered through the United States Customs, the Customs Service maintains a supervision over the oil and no oil can be drawn from the bonded tanks without the consent and presence of a Customs officer. In fact, the supervision of the United States Customs in this case goes beyond the mere supervising of withdrawal. The Customs Service requires that the petitioner furnish it a certificate from the Captain or the Engineer of the steamer using the oil, showing that it was used on the high seas. It may be said, therefore, that the supervision of the Customs officers over the fuel oil involved continues until the same is wholly consumed at sea (R. 31, Q90).

Sales are made both to lines which journey to foreign countries and thus consume the fuel oil in foreign commerce and to lines which go from Puerto Rico to United States ports and thus consume the fuel oil in what might be designated as coastwise traffic (R. 26, XQ32). The District Court took as admitted by the parties that the fuel oil delivered to the steamers for use on the high seas was both in the course of interstate commerce and of foreign commerce, thus taking judicial notice of the fact that both the New York & Porto Rico Steamship Co. and the Compañía Trasatlántica Española referred to in cross-question 32 on page 26 of the Record, make trips to foreign countries.

When a cargo of fuel oil is brought to Puerto Rico by the petitioner from Aruba, Dutch West Indies, that part of the cargo destined for use in the bunkers of ship is stored

in a bonded tank as is also the part destined for re-export to foreign countries (R. 26, Q24; also R. 27, XQ42). That part of the cargo destined for consumption in Puerto Rico is entered through the Customs and stored in other tanks not bonded.

The usual course of business in the delivery of fuel oil to ships' bunkers by petitioner involves the making of contracts of sale in New York by another oil company (presumably an affiliate) and orders or requests to petitioner to deliver certain amounts of oil to the steamers involved under the contracts (R. 24, Q15; R. 26, Q22; R. 29, XQ73).

Occasionally small amounts are drawn from the bonded tank for use in Puerto Rico and in such cases this oil is entered through the Customs Service in the regular way, the Customs duty is paid and also the Puerto Rico sales tax here involved is paid on such oil so withdrawn for use locally. Amounts withdrawn for sale or use in Puerto Rico are small, the principal object of the bonded tanks being to supply ships' bunkers for use at sea (R. 30, XQ86; R. 30, Q82).

On December 3rd, 1932, under Section 555 of the Tariff Act of 1930, petitioner's predecessor company bonded two of its tanks for such a storage of fuel oil entered in bond from foreign countries and destined either for re-export or for delivery to ships' bunkers for use on the high seas. In 1935 the respondent Treasurer of Puerto Rico attempted to collect a 2% tax on such oil delivered to ships' bunkers for use on the high seas from the bonded tanks, under Section 62 of Act No. 85 of the Legislature of Puerto Rico approved August 20th, 1925, as amended (quoted above, p. 4). When the fuel oil is brought from the Dutch West Indies, the proportion destined for export and for ships' bunkers is not entered through the Customs but is placed in the bonded tanks, and the part destined for sale or use in Puerto Rico

is entered in the regular way, the federal tax is paid anc 2% Puerto Rican sales tax is paid.

The only controversy here involved is in respect to fuel oil pumped into ships' bunkers out of the bonded t for use of the ships on the high seas in journeys in for and domestic commerce.

Petitioner's Contention.

Petitioner takes the position that the fuel oil invo in this case, never having been entered through the Ur States Customs, acquired no *situs* for taxation in Pu Rico and that as a corollary proposition the Insular Gov ment is without authority to tax any transaction suc sale or delivery, moving such fuel oil in commerce. merchandise at no time passed through the tariff bar of the United States and at no time became a part of mass of property within the territory and thus subje the territorial jurisdiction for taxing purposes, whethe excise or property taxes. The situation would possibl different if the fuel oil had ever been entered through Customs and had become a part of the mass of prop within the jurisdiction of Puerto Rico. Then it might become subject to local property taxes or excises, but so as the present case is concerned, the oil was never w the jurisdiction of Puerto Rico, and the transaction w moved the oil on board the ship is not subject to taxation.

Petitioner also contends that at all times the fue involved was subject to the provisions of the Revenue of 1932 as amended and that this Federal statute ha provided through reference to the Tariff Act of 1930, such ship supplies shall be considered as "exports", local Insular Government of Puerto Rico is also boun treat these deliveries as exports so long as the sup

never left the control and custody of the Customs officers. A tax on exports is forbidden to the Insular Government of Puerto Rico by Section 3 of the Act of Congress of March 2, 1917 known as the Organic Act of Puerto Rico (39 Stat. 953, 48 U. S. C. A. 741).

To allow Puerto Rico to tax the delivery of this foreign oil to ships' bunkers is to permit the Insular Government to frustrate and defeat the declared purpose of Congress in the Revenue Act of 1932 and the Tariff Act of 1930 to exempt ships' fuel oil from tax.

Petitioner also takes the position that the application of the insular tax to the fuel oil here involved would constitute in fact a direct and prohibited burden on interstate and foreign commerce and a duty on tonnage.

Specifications of Errors to be Urged.

The specifications of errors to be urged are found above under the heading of "Questions Presented" and "Petitioner's Contention".

Summary of Argument.

Petitioner's argument is to the following effect. No importation of foreign merchandise is complete under either administrative or judicial decisions so long as the goods remain under the custody and control of the proper officials of the United States Customs Service and the importation is complete only when the proper duties have been paid and the merchandise released from Customs custody to the complete control of the importer. So long as the goods remain under the control of the Customs Service, the merchandise is *in process* of importation and cannot be subject to taxes

or other exactions of states or other taxing jurisdictions other than the United States Government. A territorial tax at this stage either on the property or on a transaction moving the property would be equivalent to an "import duty" which Puerto Rico cannot lay. Also to hold otherwise would be to permit the states and territories to interfere with and perhaps even prohibit (through taxes or other exactions) the importation of foreign goods, a power denied to them under the Constitution of the United States, Article I, Section 8, Clause 3. The foreign fuel oil involved in the present case came under the immediate and complete supervision of the United States Customs Service from the moment it entered the harbor of San Juan (or Ponce, as the case may be) and such supervision and control never ceased until the oil was consumed at sea by ships in their journeys. It was never "imported" into Puerto Rico, but was merely entered in bond until such time as it should be delivered to the ships' bunkers. The argument then follows that Puerto Rico never acquired taxing jurisdiction over this fuel oil; it never entered technically into the Island and never became a part of the mass of property in the Island, but remained apart under federal control.

A second argument is based on the provisions of the United States Tariff Act of 1930, as amended, which in dealing with certain supplies to ships, including fuel oil, states that such supplies shall be treated as "exported". The Revenue Act of 1932 in Section 601(b) provides that the taxes involved "shall be treated for the purposes of all provisions of law relating to customs revenue as a duty imposed by such Act . . . " (Tariff Act of 1930). So far as the fuel oil here involved is concerned, all the provisions of law relating to customs duties apply. Further in the Tariff Act of 1930, Congress incorporated by reference the regulations of the Secretary of the Treasury (Sec. 309). Article

942 of the Customs Regulations of 1931 provides in part that "Imported goods in bonded warehouses are exempt from taxation under the general laws of the several States." This identical regulation also appears in Customs Regulations of 1937 (Art. 940) and in prior regulations (1923). Congress in the title to the Tariff Act of 1930 has asserted that one of the purposes of the act is to "regulate commerce with foreign countries" and another purpose is "to encourage the industries of the United States."

It is not contended that the fuel oil here involved was "exported" in the technical sense, but it is contended that Congress has said that such fuel oil shall be treated as if exported, and that the territory of Puerto Rico is bound by this expressed intention of Congress and is bound also to treat this fuel oil as if it were an export. It follows that no tax on any transaction moving this oil in commerce could be taxed by Puerto Rico, being prohibited both by the will of Congress in the Revenue Act of 1932, and by the Customs Regulations.

A further argument will be made to the effect that under the circumstances of this case, the fuel oil involved never left the channels of interstate or foreign commerce, and that in such case a tax cannot be validly laid by Puerto Rico on the delivery of the oil to ships' bunkers. It would seem also that a tax on this oil or upon the delivery to ships' bunkers would be a direct burden on interstate and foreign commerce, since the oil is used exclusively in the propulsion of ships in interstate and foreign commerce. From a practical standpoint, if the present tax is valid, the Insular Government *could* impose such taxes as to make it impossible for ships to fuel in Puerto Rican ports and thus drive them to fuel in foreign or other ports. The debates in Congress on the Revenue Act of 1932 and its amendments

show that Congress had precisely this situation in mind when it exempted ships' supplies from taxes.

In the case of *McGoldrick* v. *Berwind-White Coal Mining Co.*, 84 Law Ed. 343 (Advance Sheets) the Court held that the New York City sales tax was applicable to a contract of sale made in New York for delivery in New York from Pennsylvania. But this Court has never held, we believe, that the State of *exit* could levy a tax on goods moving in interstate commerce or on the transaction moving them. In the *Berwind-White* case, no foreign goods were involved and the questions here involved were not touched upon, but we point out that in that case, both the contract and the delivery were in New York and at least part of the goods were to be used and consumed in New York. In the instant case, the fuel oil is *moved out* of Puerto Rico to the high seas by the transaction attempted to be taxed, and the contract for sale is not made in Puerto Rico, with the added important fact that the fuel oil was never technically in Puerto Rico, but was under the control of the United States Customs Service at all times. On principle, the instant case is analogous to the case of *McGoldrick* v. *Gulf Oil Corporation*, 84 Law. Ed. 597 (Advance Sheets). There the oil also was foreign, entered in bond and there the oil was subsequently pumped into ships' bunkers for use in propelling the ships in foreign commerce. The principal distinction between the *Gulf Oil* case and the instant case is that here some of the oil is used in propelling ships in foreign commerce and some in propelling ships in the coastwise trade between ports of Puerto Rico and ports of the continental United States. The principles involved would seem to be the same. for the burden on interstate commerce would be exactly as great as the burden on foreign commerce and both are matters of national concern, on which Congress has spoken and occupied the field.

ARGUMENT.

POINT I.

The importation of the fuel oil here concerned was ıever completed.

Coming from Aruba, Dutch West Indies, a foreign ountry, the fuel oil involved in this case came directly nder the control of the United States Customs officers rom the moment it entered the harbor in Puerto Rico and emains under such custody and control until it is pumped nto ships' bunkers and wholly consumed at sea. From he time it enters the harbor it is segregated from the genral mass of property within the territory of Puerto Rico nd never becomes mingled with such common mass of roperty. It has long been held that the importation of oreign mechandise is not complete so long as the goods emain in the control or custody of the proper officers of he Customs Service.

In the case of *Fabbri* v. *Murphy,* 95 U. S. 191, 197, it s said, referring to an earlier act:

> "Throughout these provisions the plain inference is that Congress did not regard the importation as complete while the goods remained in the custody of the proper officers of the Customs."

The same situation exists today and the same reasoning vill hold for the Tariff Act of 1930, which is applicable to he fuel oil in this case. The Executive Branch of the Jnited States Government, we submit, has always taken he same view. Treasury Decisions 21,158 (1899); 14 Opinons A. G. U. S. 574; 21 Id. 233; 27 Id. 440. The reasoning hroughout these opinions and rulings is as applicable today s it was when they were written. See also *Harris* v. *Dennie,*

28 U. S. 292; *In re Johnson,* 13 Fed. Cases No. 7424; *Marriott* v. *Brune,* 50 U. S. 619, 632; *Lawder* v. *Stone,* 187 U. S. 281, 284, 286.

Bonded warehouses are considered as agencies of the United States. 33 C. J. 340. In the case of *American Cigar Co.* v. *United States,* 146 Fed. 484 (reversed later on other grounds), it was held that the importation of merchandise is not completed while the goods remain in the custody of Customs officers and that the general rule is that revenue can be collected only upon the quantity of the taxable subject matter which is actually imported and received by the importer so as to come into the *consumption of the country.* In *Marriott* v. *Brune, supra,* this Court said:

> "As to imports, they, therefore, can cover nothing which is not actually brought into our limits. That is the whole amount which is entered at the custom-house; that is all which goes into the consumption of the country; that, and that alone, is what comes in competition with our domestic manufacture . . ."

In 17 C. J. 552, in discussing customs duties, it is said:

> "With regard to goods in public stores and bonded warehouses it may be said that Congress does not regard their importation as complete while they so remain in the custody of the Customs officials . . ."

In the same volume of Corpus Juris, at page 661, it is said in regard to bonded warehouses, such as the one here involved:

> "The effect of warehousing goods under these provisions is to place them in the possession of the sovereign."

We believe that these principles of law are still the proper concepts and we know of no cases which have

nged them. In the present case, while the fuel oil is in bonded tanks, while it is being pumped to ships' bunkers, l after it is so pumped, it is at all times segregated from domestic goods and on the books of the customhouse the only way that goods of this nature can be segregated, t is, by careful accounting of the location and disposition the merchandise. This is done by the United States Cusns officers and even while the vessel is sailing, the superion of the United States Customs authorities continues . 31).

It is clear that the importation of the fuel oil here conned was never terminated, no federal duties were paid . 26; U. S. Internal Revenue Code, Section 3451).

POINT II.

An insular sales tax on a transaction moving out of country foreign goods in the process of importan is a tax on imports and forbidden to the Insular vernment.

The goods concerned having never lost their distinctive racter as an import, any tax imposed by the Insular Government upon the goods or upon the delivery of the same outgoing vessels would be a tax of the nature of an port duty. Assuming for the sake of argument that the e of the goods here concerned was made in Puerto Rico ause the delivery to the ships was made here (as was d by the Supreme Court of Puerto Rico), nevertheless s sale was the *first sale* of an import which in fact had 'er lost its distinctive character as an import. Such a is forbidden under the doctrine of *Brown* v. *Maryland*, U. S. 419, and of the cases subsequently modifying and tinguishing that case. It is only when the merchandise

imported has become incorporated into the general mass of property of the country that it loses its distinctive character as an import and any tax, regardless of the name of the tax, laid upon the goods in process of importation, "intercepts the import, as an import, on its way to become incorporated with the general mass of property . . ."

This Court also said in *Brown* v. *Maryland:*

> ". . . All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself . . . It is sufficient for the present to say generally that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import and has become subject to the taxing power of the state; but while remaining the property of the importer in his warehouse, in the original form of package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."

The Original Package Doctrine is simply one convenient means of establishing a division line between imports and property incorporated into the general mass of property in the state. In so far as it is possible for bulk fuel oil to be in original packages at all, we think it may be said that the fuel oil involved in this case is subject to that doctrine since it was at all times readily identifiable as an import and easy to trace. *City of Galveston* v. *Mexican Petroleum Corporation,* 15 Fed. (2d) 208; *Southern Pac. Co.* v. *City of Calexico,* 288 Fed. 634.

In the present case not only had the oil involved retained its distinctive character as an import, but as pointed out in Point I of the Argument, it had never finished the course of importation, but had been segregated and was held under bond.

Article 942 of the Customs Regulations of 1931 provides part that "merchandise in bonded warehouse is not sub-ct to levy, attachment or other process of a state court . . . nported goods in bonded warehouse are exempt from taxa-on under the general laws of the several states." These rovisions are the same as appear in Customs Regulations, 37 (Article 940); 1923 (Article 850); and 1915 (Article 1). These regulations were in force at the time the Tariff ct of 1930 went into effect and were incorporated therein reference by the provisions of Section 309.

That taxes imposed on goods still in Customs custody or oon a transaction directly connected with the same are the uivalent of import duties, we think has always been the olding of this and other courts. *United States* v. *Pillsbury lour Mills Co.*, 96 Fed. (2d) 854 (certiorari denied 304 . S. 582); *Faber et als.* v. *United States*, 97 Fed. (2d) 115; *eorge E. Warren Corp.* v. *United States*, 97 Fed. (2d) 105 ertiorari denied 305 U. S. 600); *Marshall Field & Co.* v. *nited States*, T. D. 47,877. See also *Low* v. *Austin*, 13 all. 29; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 3, 494; *Willcuts* v. *Bunn*, 282 U. S. 216, 228; *Anglo-Chilean orp.* v. *Alabama*, 288 U. S. 218, 226; *Cassaza & Brother* v. *nited States*, 13 Ct. Cust. App. 627; *Stone & Downer Co.* *United States*, 19 C. C. P. A. (Customs) 259; *Shaw & Co.* *United States*, 16 Ct. Cust. App. 214, 220.

Puerto Rico, as regards tariff laws and regulations, is in e same position as a state (31 Stat. 77, 48 U. S. C. A. 39).

On the lack of power of the states to impose taxes of any ind connected with goods in Customs custody, the Secre-ry of the Treasury, on May 18th, 1899 (T. D. 21,158) ruled s follows:

> "The Department is in receipt of your letter of the 8th instant, transmitting an application, ad-

> dressed to you by the chairman of the finance committee of the board of supervisors of San Francisco, for permission to inspect entries of goods in bond at your port, in order that the goods may be assessed for municipal taxes.
>
> "In reply, I have to state that inasmuch as, under Section 2971 of the Revised Statutes, importers have a right to withdraw bonded goods for exportation within three years from date of bonding, pending which such goods *have no status as imports for the purposes mentioned*, your action in refusing access to your records for said purpose is proper under article 1166 of the regulations, and meets the approval of the Department." (Italics supplied.)

The case of *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506, draws a distinction between imports from foreign countries and interstate commerce as regards immunity from State taxation. It is said in that case that *in imports*, the immunity attaches to the import itself before sale following the case of *Brown* v. *Maryland, supra*, and the cases based upon that case including *Low* v. *Austin*, 13 Wall. 29, and *May* v. *New Orleans*, 178 U. S. 496. The same rule which prevented a license or occupation tax in *Brown* v. *Maryland*, a property tax in *Low* v. *Austin* and an occupation tax in *Cooke* v. *Pennsylvania*, 97 U. S. 566, would seem to protect imports in Puerto Rico against a local sales tax on their sale before they had passed through the Customs and been released by the officers of the United States. It is difficult to see any distinction in principle between the present case and the ones just cited. Foreign merchandise is treated in all of them, with the added fact that in the present case not only is the foreign fuel oil not entered through the Customs, but it is actually shipped out of the geographical confines of Puerto Rico while under the supervision of the United States Customs.

The statement in the opinion of the Circuit Court of ppeals that the transaction in the present case receives the rotection of the insular laws is difficult to follow. Cerainly while the foreign fuel oil involved was in the bonded anks in process of importation, it was under the exclusive rotection of the Federal Government and laws and not under he protection of the insular laws. The contract for sale was nade in New York and hence did not come under the proection of the insular laws. The physical delivery of the oil o the ships out of the bonded tanks in Puerto Rico was cerainly made under the protection of the Federal laws and nder the supervision of the United States Customs officers. There is no point at which the Insular Government furnishes ny protection either to the transaction which it pretends o tax nor to the merchandise itself. There is thus nothing or which taxation can be "equivalent" as pointed out by "Cooley on Taxation", 4th Edition, Vol. 1, p. 219. The asic reasoning in a case of this kind is shown by Cooley n the same volume at page 222, where he states:

> "The accidental circumstance that it (the state) may have the means of reaching (the person concerned) can make no difference; there must be an interest in the subject matter of the tax; there must be between the state and the taxpayer a reciprocity of duty and obligation . . ."

POINT III.

The foreign fuel oil here involved delivered to hips' bunkers for use on the high seas out of bonded anks was "exported" within the meaning of the Revnue Act of 1932 and this definition by Congress is ontrolling on the insular authorities of Puerto Rico.

A—The fuel oil in question is an "export" so far as the Tariff Act of 1930 and the Revenue Act of 1932 are con-

cerned. It is not contended that such fuel oil was "exported" in the technical sense of the term as defined in the case of *Swan & Finch Co.* v. *United States,* 190 U. S. 143, although the use of the word "export", as a mere sending out of the country without the necessary implication of landing in a foreign country, is not unknown in the precedents, depending upon the particular case. *United States* v. *Chavez,* 228 U. S. 525; *Cunard SS. Co.* v. *Mellon,* 262 U. S. 100. In both of these cases it was implied that the word "export" has a primary meaning which signifies the carrying out of goods from a country without regard to their landing in a foreign country. In the instant case it is the contention of petitioner that the intention of Congress was that fuel oil loaded as ships' supplies *should be treated as exports* and that Congress, in the exercise of its powers over interstate and foreign commerce was within its rights in determining that the word "export" in regard to ships' supplies should be given its ordinary or primary definition rather than its technical definition.

The Tariff Act of 1930 is entitled "An Act to provide revenue, *to regulate commerce with foreign countries, to encourage the industries of the United States,* to protect American labor and for other purposes." 19 U. S. C. A. 1001. (Italics supplied.) Congress may regulate commerce through a taxing act. *Board of Trustees, etc.* v. *United States,* 289 U. S. 48, and the drawback provisions and analogous provisions have been stated to be for the purpose of encouraging manufactures in this country as well as to build up an export trade. *Tide Water Oil Co.* v. *United States,* 171 U. S. 210, 216; 43 Law. Ed. 139. In the title to the Tariff Act of 1930 Congress had asserted that its purpose was to regulate commerce and to encourage the industries of the United States. In the exercise of this power, Congress, in Section 309 of the Tariff Act of 1930 (copied

ante, p. 5) has provided that articles either of foreign or domestic manufacture or production may be withdrawn from bonded warehouses free of duty or internal revenue tax for ships' supplies. Specific mention is made of vessels engaged in trade "between the United States and any of its possessions". In the same section, under the sub-title "Drawback", articles of domestic manufacture or production are considered to be exported for the purpose of the drawback provisions.

The Revenue Act of 1932 (pertinent parts copied *ante,* pp. 7-8), in referring to the tax on articles covered in Section 601(c)(4), which includes fuel oil, states that the tax shall apply only with respect to the importation of such articles and it is specifically stated that these taxes are collectible "unless treaty provisions of the United States otherwise provide". It is further provided in Section 601(b) that with certain exceptions, the taxes shall be levied, assessed, collected and paid "in the same manner as a duty imposed by the Tariff Act of 1930 and shall be treated for the purposes of all provisions of law relating to Customs revenue as a duty imposed by such Act . . ." The Tariff Act of 1930 in turn has incorporated by reference the Customs regulations relating to the entry of merchandise in bonded warehouses and its withdrawal for exportation or transfer to ships' bunkers for use at sea. *McGoldrick* v. *Gulf Oil Corp.,* 84 Law. Ed. 597, 600 (Advance Sheets). When we examine Customs Regulations of 1923, those of 1931 and those of 1937, we find a consistent scheme in consonance with the statutes under which the regulations are made, which operates as a national regulation of foreign commerce. In Chapter XVII of the Customs Regulations of 1923 the different classes of bonded warehouses are provided for in Article 829. Strict superintendence over such warehouses is provided for in Article 830 and others and in Article 883 even the withdrawal of waste products for con-

sumption is provided for and duties must be paid if applicable to such products. The last paragraph of Article 850 provides that imported goods in the warehouses are exempt from state taxes, citing *Low* v. *Austin,* 13 Wall. 29, and other cases in the margin. In the Tariff Regulations of 1931 substantially the same classes of warehouses are provided for in Article 921 in Chapter XVII, which chapter covers the bonding of warehouses. As illustrating how strict is the supervision of the Customs, it is provided in Article 926 that no alterations in the warehouses can be made except with the permission of the Customs authorities. Article 942 corresponds to Article 850 of the Regulations of 1923 and provides that articles in bonded warehouses are not subject to attachment by state courts and are exempt from state taxes. Article 961 relating to the withdrawal of waste products for consumption corresponds to Article 883 of 1923 and shows that these waste products when withdrawn for consumption are treated as having completed their importation course. Articles 455 to 461 of 1931 relate to the entry of merchandise and its withdrawal for disposition either as ships' stores or for re-exportation. Article 461 dealing with the supervision and check on ships' stores taken out of bonded warehouses, provides:

> "The bond given on withdrawal of supplies shall be cancelled upon production of an affidavit of the Master or other officer of the vessel having knowledge of the facts, showing that such supplies have been used on board the vessel, and no portion thereof landed within the limits of the United States or any of its possessions."

Substantially the same provisions are covered in the Customs Regulations of 1937 in Articles 464, 467 and 470.

The statutes referred to and the regulations taken together, are intended to treat ships' stores and supplies as

"exported" and to thus exempt them not only from the federal import duties or internal revenue taxes, but also from all state and local taxes. The history of the Revenue Act of 1932 and its amendments bears out our contention in this respect.

In reporting on the 1933 amendment to the Revenue Act of 1932 the Senate Committee (Senate Report No. 58, 73rd Congress, first session May 1st, 1933) expressed the purpose that Congress had in mind in exempting supplies for vessels.

> "Your committee has inserted a new Section 5 providing for exemption from the manufacturers' excise taxes under the Revenue Act of 1932 of articles sold for use as supplies or equipment on vessels of war, vessels employed in the fisheries or whaling business, or actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or between the United States and any of its possessions. It is believed that this amendment will enable American manufacturers to compete more favorably with their foreign competitors for this business without any substantial loss of revenue since *the effect of the present law is to force purchase abroad.* The bill also provides for allowance of drawback on articles manufactured or produced with the use of merchandise on the importation of which tax has been paid under the Revenue Act of 1932, when such articles are laden for use as supplies on vessels of the classes enumerated. *This also relieves American manufacturers from a competitive disadvantage."* (Italics supplied.)

The debates on the same section show what was in the minds of the members of Congress (Congressional Record, May 11, 1933, p. 3262).

> "Mr. Harrison: There is also a provision that deals with fuel oils and ship's stores and sea stores.

> It was found that many of the vessels which carry on the foreign trade heretofore had bought their fuel oil in this country, but since the passage of the tax act they have changed their practice and are filling their tanks abroad in the ports of foreign countries, and we are losing that trade. A provision is recommended by the committee that in the case of fuel oil, ship's stores, and so forth, as involved *in this class of foreign trade,* the tax shall not be imposed.
>
> "Mr. Reed: Mr. President, the idea is this: At the present time, *ships* under the American flag or foreign flags, *engaged in the various services mentioned here, all have opportunity to buy their fuel oil at foreign ports, and since we have put a tax on that oil they have all been doing it.*" (Italics supplied.)

B—The intention of Congress to treat ships' supplies such as the fuel oil here involved as an "export" is binding on Puerto Rico. This is true from the fact that Congress has plenary control over interstate and foreign commerce, and is reinforced by the plenary control of Congress over Puerto Rico under Article 4, Section 3, Clause 2, of the Constitution. Unless otherwise provided the same federal laws and regulations governing tariffs, customs and matters related thereto, are in effect in Puerto Rico exactly as they are in effect in the several states (48 U. S. Code 739 and the Tariff Act of 1930). It is believed that under the circumstances here set out, no state could make effective a sales tax upon foreign fuel oil taken out of bonded tanks for ships' bunkers (*McGoldrick* v. *Gulf Oil Corp., supra*) and there is no statute or reason known to us why the territory of Puerto Rico should be in a different position from a state in regard to this matter.

The fuel oil here concerned at the time it was pumped into ships' bunkers from the bonded tanks under the supervision of the federal Customs authorities, was exported

within the meaning of the Tariff Act of 1930 and the Revenue Act of 1932 and the provisions of these two acts relating to the status of this oil would necessarily govern and control as to the insular authorities. Otherwise the Insular Government would be able to interfere with and annul the expressed intention of Congress in regard to ships' supplies. Congress intended, as shown by the Committee Report of the Senate and by the debates, *supra* pages 27-28, to encourage the fueling of both foreign and domestic ships in American harbors and it would seem quite evident that a tax by Puerto Rico either upon the foreign fuel oil itself or upon the delivery of the same to ships' bunkers would interfere with that intention of Congress. We believe that even had the fuel oil here involved been brought completely within the country and afterwards laden as ships' supplies by a first sale, it would nevertheless be exempt from the insular excise tax under the same laws and regulations which we have quoted above, but it is not necessary to decide that particular question in view of the fact that this fuel oil never completed its importation but was at all times segregated and at all times maintained its status as an import and under the supervision and control of the United States Customs officers from the time it entered the harbor until it was fully consumed at sea (Article 461, Customs Regulations of 1931, *supra;* Article 470, "Affidavit of Use", Customs Regulations of 1937).

C—A tax on the sale or upon the transaction which moves the foreign fuel oil would be no different in fact and in effect from a tax upon the import itself. See discussion above on this point, pages 19 and 20 of this brief. The *McGoldrick* cases decided by this Court January 29th, 1940 (*McGoldrick* v. *Berwind-White Coal Mining Co.*, 84 Law. Ed. 343 (Advance Sheets); *McGoldrick* v. *Felt & Tarrant Mfg. Co.*, 84 Law Ed. 360 (Advance Sheets)) do not decide

any question involved in the present case. In those two cases the goods were domestic to the United States, the orders were taken in the City of New York and the goods delivered in the City of New York, presumably, or at least in part, for consumption there. Under the circumstances of those cases, the tax might be said to be the equivalent of a use tax. See article on the *Berwind-White* case in the Harvard Law Review, Vol. 53, No 6, p. 909. The present case is entirely distinct from those cases in that the merchandise is foreign, it retains at all times its distinctive character as an import, it is under the supervision of the United States Customs officers at all times, and it is consumed by vessels in their propulsion in foreign commerce and in commerce between the United States and Puerto Rico. The present case is quite similar, as pointed out above, to *McGoldrick* v. *Gulf Oil Corporation* and in part to *McGoldrick* v. *Compagnie Generale Transatlantique* decided March 25, 1940, 84 Law. Ed. (Advance Sheets, Pamphlet No. 11).

It may be inferred from the opinion of the Supreme Court of Puerto Rico that no tax can be levied on the oil while it was in the bonded tanks (R. 39, 46). The Court there said:

> "We have hereinbefore stated that the Treasurer did not and does not attempt to levy a sales tax on the fuel oil while it is still deposited in the bonded tank, under the control and supervision of the customs service. *If he were attempting such a thing the case would be easy to decide, since such a tax would be a clear violation of Article 1, Section 10, Paragraph 3, of the Federal Constitution,* which prohibits the States from levying taxes or duties on imports or exports." (Italics supplied.)

This, we think, is correct and seems to be in accordance with the previous decisions of the Supreme Court of Puerto

Rico. *Villar* v. *Hansson,* 40 P. R. R. 303. It is difficult to see by what reasoning an excise on the transaction moving such foreign merchandise directly out of the bonded tanks into ships' bunkers for use at sea would be justified, since not only is an excise on the sale of an import equivalent to a tax on the import itself (*Brown* v. *Maryland, supra*), but also to permit the excise would be to allow by indirection what could not possibly be done directly. *Thames etc. Insurance Co.* v. *United States,* 237 U. S. 19; *Helson* v. *Kentucky,* 279 U. S. 245; *Philadelphia etc. SS. Co.* v. *Pennsylvania,* 122 U. S. 326; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292; *Clyde Mallory Lines* v. *Alabama,* 296 U. S. 261.

POINT IV.

A. The taxation of fuel oil used in propelling ships upon the high seas is an integral part of foreign and coastwise commerce and is a matter of national concern rather than local. Congress has occupied the field through the provisions of the Tariff Act of 1930 and the Revenue Act of 1932.

B. Under the circumstances in this case the tax would directly burden foreign commerce and commerce between the United States and Puerto Rico.

A—If the states and territories were permitted to tax fuel oil in similar conditions to the fuel oil here involved, it would be quite possible and even probable that a great variety of tax rates would apply. The rate in Puerto Rico at present would be 2% *ad valorem,* in New York it might be 4% or 10%, and in San Francisco or New Orleans 50% or 60% *ad valorem.* Our contention here is that the operation of a vessel in foreign commerce or in commerce between

different ports of the United States by passing over the high seas, is a matter of national concern and that it was the intention in framing the Constitution that goods going out of the country, whether true exports or exports in the primary sense of the meaning as leaving the country for consumption elsewhere, should not be subject to the varying desires or whims of the seaboard states. There is no question but what an important item of cost in the operation of a vessel is the cost of fuel supplies and that such cost is a matter which directly affects the cost of exporting goods by a ship. As pointed out above, this bunker fuel oil is carried out of the country and cannot be re-landed here. For the purposes of the Revenue Act of 1932 and the Tariff Act of 1930 it is "exported" and deserves the same protection against state taxation as will be accorded to oil actually landed at a foreign port. This seems to be a logical consideration in accordance with the broader objects which the framers of the Constitution intended to accomplish by prohibiting any tax on exports and by giving Congress the exclusive power to regulate foreign and interstate commerce. Story on the Constitution, 5th Ed., Section 1016, p. 739; *Brown* v. *Maryland, supra; Henderson* v. *Mayor,* 92 U. S. 259, 273, where the Court observed that the law which governed the right to land passengers in the United States ought to be the same in every port. *Cooley* v. *Board of Wardens,* 12 How. 299, 319; *Kelley* v. *Washington,* 302 U. S. 1, 14; *Tide Water Oil Co.* v. *United States, supra; McCulloch* v. *Maryland,* 4 Wheat. 316, 407, 431; *Bowman* v. *Chicago etc. R. R. Co.,* 125 U. S. 465, 481; *Philadelphia etc. SS. Co.* v. *Pennsylvania, supra; Crew Levick Co.* v. *Pennsylvania, supra; Grogan* v. *Walker,* 259 U. S. 80, 90.

As to the control and taxation of ships' supplies for use on the high seas, Congress has spoken its will through the

Revenue Act of 1932 and as to foreign fuel oil, also, through the Tariff Act of 1930. Aside from the fact that such taxation of fuel oil used in foreign commerce and in coastwise trade is a matter of national concern, when Congress has occupied a field which it has the power to occupy, legislation on the same matter by states or territories, if ever valid, is superseded. *Southern Ry. Co.* v. *R. R. Commission,* 236 U. S. 439, 446; *Spokane etc. R. R.* v. *Campbell,* 241 U. S. 497, 511; *Texas & Pacific R. R. Co.* v. *Rigsby,* 241 U. S. 33, 41; *Southern Rwy.* v. *Reid & Beam,* 222 U. S. 444; *Southern Rwy. Co.* v. *Reid,* 222 U. S. 424, 440; *New York Central* v. *Winfield,* 244 U. S. 147; *Mo. Pac. R. R.* v. *Porter et al.,* 273 U. S. 341. Section 601(a) of the Revenue Act of 1932 makes a federal duty on importations of fuel oil expressly subject to the treaty-making power and in Section 630 exempts sales similar to the one here involved. Congress, by means of the two acts mentioned, has legislated positively in regard to a matter which is within its powers and it would seem that the territory of Puerto Rico could not attempt to go into the same field which Congress has occupied and impose restrictions and limitations upon the express will of Congress through a local tax. It cannot be overlooked that if a 2% tax in Puerto Rico on foreign fuel oil under the circumstances of this case is valid, then a 100% tax would also be valid and vessels would be driven inevitably to fuel elsewhere in foreign ports or in continental ports, or in the alternative, foreign freight rates and rates between Puerto Rico and the continental United States would have to be raised. In such case the direct effect on foreign commerce and on commerce between the United States and Puerto Rico would be quickly evident. It would seem beyond question that the taxation of the use of fuel oil (especially foreign fuel oil which never completes its importation) used in propelling

ships on the high seas is inherently a matter of national concern and not subject to local action by Puerto Rico.

B—Under the circumstances of this case, the Puerto Rican tax would directly burden foreign commerce and commerce between the United States and Puerto Rico. In the case of *Thames etc. Insurance Co.* v. *United States*, 237 U. S. 19, it was held that exportation is a *trade movement* and the exigencies of trade determine what is essential to the process of exporting. Then it was held that *marine insurance* is an integral part of exportation and a tax on the policies is essentially a tax on the exportation. Just so in the present case a tax on the sale or delivery of the fuel oil here involved and stored and destined for use and used in the propelling of vessels in foreign and interstate commerce, is a tax either upon "exports" or upon interstate and foreign commerce as such, and in either case is forbidden. The fuel oil was certainly an integral part of the interstate or foreign commerce involved and an absolutely necessary part. In referring to the tax on insurance policies Justice Hughes said:

> "The rise in rates for insurance as immediately affect exporting as an increase in freight rates, and the taxation of policies insuring cargoes during their transit to foreign ports, is as much a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves. Such taxation does not deal with preliminaries or with distinct or separable subjects; the tax falls upon the exporting process."

In the present case the tax on the oil destined for and used in the propulsion of vessels in interstate and foreign commerce, necessarily burdens directly such commerce.

In the case of *Helson* v. *Kentucky*, 279 U. S. 245, a tax on the sale or use of gasoline in Kentucky was held invalid as to application to the use of gasoline as a means of propul-

sion of an interstate ferry boat. The Court held that the tax upon the use of gasoline in this case burdened interstate commerce although the statute in terms was non-discriminatory and general. In concluding the opinion the Court said:

> "The statute here assailed clearly comes within the principle of these and numerous other decisions of like character which might be added. The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce. It reasonably cannot be distinguished from a tax for using a locomotive or a car employed in such commerce. A tax laid upon the use of the ferry boat, would present an exact parallel. *And is not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax, which falls directly upon the use of one of the means by which commerce is carried on, directly burdens that commerce.* If a tax can not be laid by a state upon the interstate transportation of the subjects of commerce, as this Court definitely has held, *it is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected. 'All restraints by exactions in the form of taxes upon such transportation, or upon acts necessary to its completion, are so many invasions of the exclusive power of Congress to regulate that portion of commerce between the States.'* Gloucester Ferry Co. v. Pennsylvania, supra, page 214." (Italics ours.)

In the case of *Crew Levick Co.* v. *Pennsylvania, supra,* an annual license tax on merchants measured by the volume of business transacted was held to be void as to the part of the tax which was covered by merchandise sales to customers in foreign countries. It was said that the tax in so far as part of it was measured by gross receipts from merchandise shipped to foreign countries, was in fact a regula-

tion of foreign commerce or a tax upon exports and the Court remarked that it was obvious that in a case of that nature "an impost upon exports and a regulation of foreign commerce may be regarded as interchangeable terms".

In *Philadelphia etc. Steamship Co.* v. *Pennsylvania, supra,* a state tax upon gross receipts of the Steamship Company incorporated under the laws of the state and derived from transportation at sea was held to be a prohibited interference with interstate and foreign commerce. As a practical matter it is difficult to see any difference between taxing the gross receipts of the Steamship Company and taxing bunker fuel oil to be used in propelling the ship in interstate and foreign commerce. See also *Steamship Company* v. *Port Wardens,* 73 U. S. 31, where the State of Louisiana passed a law to the effect that the wardens of the port of New Orleans should receive from each vessel arriving in that port the sum of $5.00 in addition to other fees whether any service was performed or not. This was held to be a prohibited regulation of commerce and also a duty on tonnage. *Clyde Line* v. *Alabama,* 296 U. S. 261; *State Tax Commission* v. *Interstate Gas Co.,* 285 U. S. 41; *Cooney* v. *Mountain States T. & T. Co.,* 294 U. S. 384.

Any state tax which is in substance and effect a tax upon interstate or foreign commerce is not saved by an innocuous name, and even though a tax statute is valid on its face, it will be invalid in its operation if its necessary effect is to lay a burden upon or interfere with interstate or foreign commerce. See Cooley on Taxation, 4th Ed., Vol. 1, page 809 and cases there cited. The ultimate and practical effect of the tax involved in the present case if it is sustained is to place an excise on the use of the fuel oil involved in propelling ships in interstate and foreign commerce. As such the tax is void. *Bingaman* v. *Golden Eagle Lines,* 297 U. S. 626. The circumstances of this case, of course, are much stronger than those in the *Bingaman* case.

POINT V.

A tax under the circumstances of this case is a prohibited duty on tonnage.

A tax upon the fuel supply of a vessel burdens one of the most important items of expense and becomes in fact a tax on the privilege of trading in the port. The tax is not an equivalent charge or a charge of any kind for any service rendered such as wharfage or pilotage and is therefore a duty on tonnage. See *Clyde Mallory Lines* v. *Alabama,* 296 U. S. 261, 264, and the cases there cited and discussed, and *Steamship Co.* v. *Port Wardens,* 73 U. S. 31. In the *Clyde Mallory* case, this Court looked to the practical effect of a charge for the privilege of trading in a port and held that the prohibition against tonnage duties would embrace any tax *regardless of its name or form* which imposed such a charge for the privilege of trading in a port, regardless of the fact that the tax might not be measured by the tonnage of the vessel. The practical effect of the present tax is to impose a very real charge for the privilege of trading in the ports of Puerto Rico. This is prohibited by Article 1, Section 10, Clause 3, of the Constitution of the United States which provides in part as follows:

> "No state shall, without the consent of Congress, lay any duty of tonnage . . ."

Marine Lighterage Corp. v. *Steamship Co.,* 248 N. Y. S. 71. If there were any equivalent service rendered or protection given by the Insular Government, it might be said that this is not a duty on tonnage, but under the circumstances of this case, the tax amounts to such a prohibited tonnage tax.

POINT VI.

The fuel oil involved in this case never left the channels of foreign commerce in contemplation of the law and no transaction connected therewith is taxable.

A—The idea that the sale of the fuel oil here involved is taxable because physical delivery (consummation of the sale) was made within the *geographical* limits of Puerto Rico, is invalid. The petitioner received no protection from the insular laws in anything connected with the sale or delivery of the oil. The contracts of sale were entered into in New York and the invoices made there and payment made there. These contracts were protected by the laws of New York; and the fuel oil under Customs custody and the delivery thereof, under the supervision of the Customs officers, to the ships, was protected exclusively by the laws of the United States. As between Puerto Rico and petitioner, there was at no time any reciprocity of duty or obligation in connection with this oil or the sale thereof, which previously has always been thought necessary as a basis for a tax.

The Supreme Court of Puerto Rico apparently assumed that at the very instant when the oil was flowing through the pipelines to ships, it came within the jurisdiction of Puerto Rico. But as pointed out before, at this time the oil was still under Customs supervision since it was foreign oil, the importation of which had never been completed.

B—The course of the oil involved in this suit is from Aruba, Dutch West Indies, a foreign port, direct to a federally bonded warehouse (tank) under the supervision and control of the United States Customs officers, thence under the same supervision and control to the bunkers of ships for consumption on the high seas in journeys between Puerto

Rico and foreign countries and between Puerto Rico and ports of the continental United States. The actual facts compel the conclusion that this oil never left the channels of foreign commerce where it originated. In *Carson Petroleum Co.* v. *Vial*, 279 U. S. 95, in dealing with interstate goods, this Court held that the temporary storage of goods in a domestic port for reasons of expedition or economy preparatory to loading, does not make the goods lose their character as goods in foreign commerce. We copy from the headnotes in this case:

> "1. Goods purchased at interior points for export do not lose their character as goods in foreign commerce and become subject to state taxation because, after shipment to the exporter to a domestic port, they are temporarily stored there for reasons of *expedition* and *economy,* preparatory to their loading on the vessels of foreign consignees. P. 101.
>
> "2. An exporter bought oil in interior States to fill orders from abroad; had it shipped by rail in tank cars to a port in Louisiana, on bills of lading to the exporter at export rates; pumped it from the car tanks into storage tanks at the port; and from these delivered it into the ships of foreign consignees, the title passing from the exporter to them upon such delivery. The oil in each tank car, and as stored, *was not segregated or destined to any particular cargo or shipment abroad;* but it was all bought and held to fill foreign orders previously received; none of it was or could be otherwise disposed of at that port; none of it was subjected to any treatment of manufacture there; and the storage was but a necessary means of securing prompt transshipment and avoiding demurrage charges, by accumulating the oil from the tank cars pending the arrival of a foreign consignee's ship, or to make up a full cargo for one already waiting. *Held that the continuity of the journey was not broken by the storage, and that a Louisiana tax on the oil while so stored was unconstitutional.*" (Italics ours.)

See also *Railway Co.* v. *Sabine Tram. Co.*, 227 U. S. 111; *United States Customs Regulations of 1931*, Section 942, *supra*; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282 at p. 292; *Bingaman* v. *Golden Eagle Lines*, 297 U. S. 626; *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 583; *Steamship Co.* v. *Pennsylvania*, 122 U. S. 326.

In the *Dahnke-Walker* case a Tennessee corporation purchased grain in Kentucky by contract to be transported to Tennessee. The grain was to be delivered in Kentucky on the cars of a public carrier. The suit arose over a breach of contract, but this Court held in deciding the case that the transaction was in interstate commerce, notwithstanding the contract was made and to be performed in Kentucky, and that the possibility that the purchaser of the grain might change its mind and sell the grain in Kentucky did not affect the nature of the transaction. So here, the fact that the petitioner might have withdrawn some of the oil for local use, did not affect the status of the oil in the bonded tanks which was actually later delivered to the bunkers of steamships.

The present tax certainly cannot be justified as a use tax since the use is wholly in commerce outside of Puerto Rico. *Helson* v. *Kentucky*, 279 U. S. 245. The contract of sale should not be taxable in Puerto Rico since it took place in New York. The only thing occurring in Puerto Rico was the delivery of the oil within the geographical limits of the Island, but this took place under the strict control and supervision of the United States Customs officers. There is no point of time where the Insular Government could make effective any tax upon this fuel oil or upon the transaction moving it. It is evident from the facts of the case that it is impossible for this fuel oil to ever become a part of the mass of property within Puerto Rico and the

fact that the foreign oil here involved, if not "exported" in the strict sense, nevertheless was carried out of the Island, makes necessary the conclusion that at all times it was continuously in the channels of foreign commerce in contemplation of law. *Carson Petroleum Co.* v. *Vial, supra; Terminal Co.* v. *Interstate Commerce Commission,* 219 U. S. 498; *Superior Oil Co.* v. *Mississippi,* 280 U. S. 390; *Robbins* v. *Shelby Taxing District,* 120 U. S. 489.

Even if the tax were a use tax, it would be upon a use so closely connected with foreign commerce as to be a part thereof. In *Henneford* v. *Silas Mason Co., supra,* Mr. Justice Cardozo observed:

> "A tax upon a use so closely connected with delivery as to be in substance a part thereof, might be subject to the same objections that would be applicable to a tax upon the sale itself."

Here the converse is true. The statute says the tax is upon the sale (the Supreme Court of Puerto Rico construed "sale" as meaning delivery), but upon a sale so closely connected with the use in foreign and other commerce outside Puerto Rico as to be open to exactly the same objections as if the tax had been laid directly upon the use of the foreign oil by the vessels at sea.

C—The interstate or foreign character of the merchandise is not affected by the right of diversion to a local destination when such right is not exercised. All of the foreign oil here involved was actually pumped into ships' bunkers for use at sea. See *Dahnke-Walker Milling Co.* v. *Bondurant, supra.* Neither does the fact that smaller quantities may be taken out for local delivery affect the essential character of the remaining merchandise. *Eureka Pipeline Co.* v. *Hallanan,* 257 U. S. 265; *United Fuel Gas Co.* v. *Hallanan,* 257 U. S. 277; *City of Galveston* v. *Mexican*

Petroleum Corporation, 15 Fed. (2d) 208. In the *Mexican Petroleum Corporation* case it was said:

> "Some stress has been laid upon the fact that a few thousand out of many million barrels of oil pumped in was sold for local use. The law, like other things, goes on common sense and if these small export sales, mainly matters of accommodation as they were, were to be given the effect of changing the character of this oil, it would be a case of the law being made *de minimis,* and not according to reason."

In the *Eureka Pipeline Co.* case the state of West Virginia imposed a tax of 2¢ for each barrel of oil transported by pipelines. Some of the oil was delivered to local destinations in West Virginia and other parts to extra-state destinations. The quantities diverted to local delivery were relatively small. The Court held that the right to divert a portion of the stream of oil did not affect the interstate character of the remainder, saying in this case in part:

> "The bailor assents to its becoming part of a stream that is pouring through and out of the State. Its only right is to call on the pipeline to divert a portion of that stream. So far as the oil that it calls for goes out of the State with the general current it seems to us not to be distinguishable from the rest admitted to move in interstate commerce. No bailor has title to any specific oil, and to deny the character of interstate commerce to the whole stream simply because some one might have called for a delivery that probably would have been made from it in an event that did not happen, is going too far. The charges for gathering and storage seem to us not to affect the case. The storage merely means that enough oil must be kept in the tanks and pipes to satisfy credits. The oil runs into a tank on one side and out on the other. The tank may be regarded as a pipe of larger size. Whether the plaintiff in error

was right or wrong in relying upon state law for its gathering charge its attitude does not matter here.

"As has been repeated many times, interstate commerce is a practical conception, and, as remarked by the court of first instance, a tax to be valid 'must not in its practical effect and operation burden interstate commerce.' It appears to us as a practical matter that the transmission of this stream of oil was interstate commerce from the beginning of the flow, and that it was none the less so that if different orders had been received by the pipe line it would have changed the destination upon which the oil was started and at which it in fact arrived. We repeat that the pipe line company not the producer was the master of the destination of any specific oil. Therefore its intent and action determined the character of the movement from its beginning, and neither the intent nor the direction of the movement changed."

In the *United Fuel Gas Co.* case, natural gas was involved and the same holding was made. We quote from the headnote of this case:

"2. Natural gas, collected and purchased by a pipe line company within a State and moving through its pipes, and the pipes of other companies to which it sells it, in continuous streams destined beyond the state, is a subject of interstate commerce, the transportation of which the State may not tax. P. 280.

"3. Held, that the interstate character of the gas so destined was not affected by the right of transporting companies to divert to local destinations, or by the fact that smaller quantities for local delivery were commingled with the other and the proportions between the two were not precisely fixed. P. 281."

The fuel oil here concerned was in process of importation at the time it was shipped out, and the fact that the petitioner had the right to divert a part of the foreign fuel

oil involved by entering it through the Customs and paying the import duty, can not either in logic or in law affect the character of that part of the fuel oil (the part involved in this case) which was actually taken from the bonded tanks under Customs custody for ships' fuel. In *Robbins* v. *Shelby Taxing District, supra,* it is pointed out:

> "But in making such internal regulations a state cannot impose taxes . . . upon property imported into the state from abroad . . . and not yet become part of the common mass of property therein . . ."

In *Railway Co.* v. *Sims,* 191 U. S. 441, 449, this Court said:

> " . . . we have uniformly held that states have no power to tax . . . goods imported from foreign countries . . . before they have become commingled with the general property of the state and lost their distinctive character as imports."

Conclusion.

It is respectfully submitted that the fuel oil involved in this case was never at any time within the jurisdiction of Puerto Rico and at all times had kept its distinctive character as an import and that a transaction moving such foreign fuel oil from federally bonded tanks to the bunkers of ships for use in foreign commerce and in commerce between Puerto Rico and the continental United States cannot be taxed by Puerto Rico in any form or under any guise. It is further submitted that since the deliveries and even the consumption of the fuel oil were under the control and supervision of the United States Customs officers, there was never an instant when the Puerto Rican laws could reach such oil.

It is further submitted that within the meaning of the Tariff Act of 1930, the Revenue Act of 1932 and the Customs Regulations controlling this oil at all times, the oil

when laden as ships' supplies was "exported", and that such meaning of "export" established by federal laws is binding upon the Government of Puerto Rico and no local tax can be laid upon the transaction moving the oil. The whole body of applicable Tariff and Revenue laws and regulations applicable show that the clear intention of Congress was that oil under the present circumstances should not be taxed by any local governments. *McGoldrick* v. *Gulf Oil Corporation, supra.*

If the Puerto Rican *ad valorem* tax here attempted to be levied should be made effective, it would constitute, in fact, a burden upon foreign commerce and a tax upon foreign merchandise still in the course of importation or still in the channels of foreign commerce and would be equivalent to a prohibited tax on tonnage. It would permit the Government of Puerto Rico to hinder and frustrate the declared purpose of Congress in a field of national concern and subject to national control.

The judgment of the United States Circuit Court of Appeals for the First Circuit entered December 15th, 1939, should be reversed.

Dated at San Juan, Puerto Rico, September 16th, 1940.

Respectfully submitted,

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